Common Township Questions

Attorneys

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February 7, 2020

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Presentation Overview

- A few of the most common questions received by Frost Brown Todd's township law directors in the last few years across the following areas:
  - General township business – motions vs. resolutions
  - Public records – employee disciplinary records/investigations
  - Labor & employment – employee/public official personal social media usage
  - Zoning – regulations of signage in public rights-of-way

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General Township Business:

When is it appropriate to use motions to conduct township business and when must resolutions be used?

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Motions & Resolutions

- Motions – proposals that Board of Trustees take a particular action on an issue
  - Generally require majority vote in favor to take action (certain actions require unanimous vote – *e.g.* authorizing conveyance of real property)
- Resolutions – follow a motion and embody the proposed action to be taken
- Some day-to-day procedural matters may be carried out by oral motion without a written resolution (*e.g.* approving meeting minutes, paying bills, etc.).

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Resolutions Required

- Some Revised Code provisions specifically state action must be taken by "written resolution" (*e.g.* resolutions adopted pursuant to a township's limited home rule powers[1]).
- Where the Revised Code simply states action must be taken by "resolution," at least one Ohio court has held an oral motion automatically becomes a resolution – in satisfaction of R.C. requirements – when adopted by the Board of Trustees
  - *State v. Layman*, 29 Ohio App.3d 343 (2nd Dist.1986).

[1] R.C. 504.10 states, "Each resolution of a board of township trustees adopted pursuant to this chapter shall be introduced in written form by a member of the board."

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State v. Layman

- Criminal defendant cited by the Miami Township Police Department (Montgomery County) argued his citation was invalid because the Police Department was improperly formed
- R.C. 505.48: a township police district may be created through a resolution which sets forth a complete and accurate description of the territory of the district and is adopted by a 2/3rds vote of the Board of Trustees
- Defendant argued the Trustees merely passed a motion to create the district, but the statute requires a resolution (no written resolution was presented to the Board of vote on)

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- Second District rejected defendant's argument – relying on Black's Law Dictionary definitions for motions and resolutions
  - Motion: formal mode in which a member submits a proposed measure for consideration and action
  - Resolution: formal expression of the opinion or will of official body, adopted by vote
- Based on these definitions, court reasoned "a proposal to the board is a motion which, once adopted by vote, by definition becomes a resolution."
- *State v. Layman* is an interesting case, but no other districts or later cases have specifically agreed with the Second District's analysis

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Public Records:

Are there any circumstances in which employee disciplinary records or internal investigations do not need to be released pursuant to a public records request?

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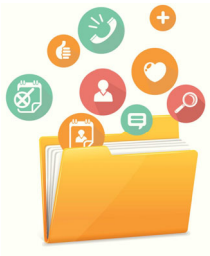
Disciplinary Records

- Whether or not township disciplinary records must be disclosed depends on the township's records retention policy and the specific records request
- If disciplinary records <u>are not</u> separate from personnel files in records retention schedule, disciplinary records must be disclosed if personnel file is requested
- If disciplinary records <u>are</u> separate from personnel files in records retention schedule, disciplinary records do not need to be disclosed if personnel file is requested



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Internal Investigations

- This question most often arises when a township must launch an internal investigation into an allegation of employee misconduct
- The answer depends on who conducts the investigation
- When township officials/employees handle the investigation, the resulting investigative report will likely be a matter of public record
- When a township's attorneys/outside counsel conduct the investigation, the resulting investigative report is likely not a public record due to attorney-client privilege

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[1]State ex. Rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Authority, 2009-Ohio-1767

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State ex. Rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Authority

- Allegations arose that Toledo Port Authority's President – James Hartung – was engaged with an extramarital affair with a lobbyist and may have improperly used public funds/his influence to the lobbyist's advantage
- Port Authority engaged its outside counsel to investigate the claims and identify pertinent factual/legal issues
- Outside counsel prepared an investigative report for review by Port Authority's Board of Directors
- Port Authority ultimately terminated Hartung, issuing a public statement that he pursued an inappropriate relationship in violation of Port Authority policies

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- Toledo Blade issued public records request for copy of the report
- Port Authority made available public records attorneys used to compile report (emails, financial statements, etc.) but denied request for report itself based on attorney-client privilege
- Supreme Court: report was not subject to disclosure as a public record due to attorney-client privilege
  - Relevant question is whether the investigation was "related to the rendition of legal services."
  - Port Authority asked its attorneys to conduct investigation because it knew investigation "was replete with various legal issues and consequences that would be better resolved by the port authority's . . . attorney."

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- Entire report was shielded from disclosure as attorney-client privileged – both factual information and analysis
- Fact that the report did not make a specific recommendation for action by the Port Authority did not impact the analysis
- Court similarly held "the absence of legal research in an attorney's communication is not determinative of privilege, so long as the communication reflects the attorney's professional skills and judgments" (which may be grounded in experience)

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- Opinion suggests witness interviews taken by attorneys during investigation may also be privileged, but Court is not explicit on this point

{¶ 33} Therefore, based on the persuasive weight of authority, we hold that the port authority has established that the investigative report was related to attorney Grigsby's rendition of legal services and is thus [illegible] from disclosure under the Public [illegible] ered by the [illegible] holding "fu[illegible] of the privil[illegible] munication *Leslie*, 105 [illegible] 824 N.E.2d [illegible] verted evid[illegible] authority st[illegible] by was an a[illegible] openly and [illegible] standing th[illegible] vestigation [illegible] could carry [illegible] Nor did the [illegible] report sign[illegible] porting on t[illegible] responded t[illegible] the Blade from mid-July 2008 until early August 2008 by making available to the Blade thousands of documents, including all public records reviewed by the attorneys in connection with the preparation of the investigative report. The Blade reported extensively about the matter.

ered by the attorney-client privilege. This holding "furthers the laudatory objectives of the privilege: complete and candid communication between attorneys and clients." *Leslie*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 43. As the uncontroverted evidence established, because port authority staff members knew that Grigsby was an attorney, they felt free to speak openly and candidly and with the understanding that their comments and the investigation were serious legal matters that could carry serious legal consequences.

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Labor & Employment:

Can a township regulate employees/officials' personal social media usage?

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Employee/Public Official Social Media Usage

- A townships ability to regulate employee/public official use of social media is limited because use of social media implicates First Amendment rights
- Townships may maintain social media policies that restrict employees/officials from posting on personal social media sites in a manner that appears they are speaking in their official capacity as a township employee/official or speaking on behalf of the township
  - This type of speech raises potential issues:
    - Public records issues;
    - Open Meetings Act issues; and
    - First Amendment issues

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Public Records Issues

- Townships are bound by Ohio Public Records law – any content posted on behalf of the township may be a public record
- Townships should have a retention policy in place for content posted on official social media sites on behalf of the township
- If it appears a township employee/official is posting content on social media on behalf of the township, this content could be considered a public record, subject to retention policies

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Public Officials' Use of Social Media: Open Meetings Act & First Amendment Issues

- Elected officials must not discuss matters of public concern with other elected officials over a social media platform – this could be construed as a violation of Ohio's Open Meetings Act
- Elected officials who run their social media pages in a manner that appears the pages are official/governmental in nature can inadvertently create a public forum for speech for First Amendment purposes
  - If an official blocks a citizen from posting on the page or deletes a comment, both the official and the township could be liable for a First Amendment claim

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Tips for a Strong Social Media Policy

- The policy should cover 3 main areas:
  1) How elected officials/employees should maintain personal social media pages
  2) How the Township will run its official social media pages
  3) Limitations on the rights of users on official Township social media pages
- Township employee/officials' personal social media sites:
  - Official titles should not appear in displayed name
  - Official township number/email should not be listed as contact information
  - Links to official township sites should not be provided
  - Content from official township sites should not be shared/reposted
  - Branding from official township sites should not be copied on personal sites

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Zoning:

To what extent may a township regulate signs placed by citizens in public places?

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Regulation of Signage in Public Places

- Regulating signage in public places has been a historically tricky issue
- Virtually any regulation will subject a township to some liability for a First Amendment claim
- Case law suggests a township may reduce its liability for a First Amendment claim by ensuring sign regulations:
  - are content neutral (equally applicable to all signs, regardless of their message); and
  - Further a compelling governmental interest.
- One of the most recent U.S. Supreme Court cases addressing this issue is *Reed v. Gilbert, Arizona*, 135 S.Ct. 2218 (U.S. 2015).

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Reed v. Town of Gilbert, Arizona

- Supreme Court considered constitutionality of town's sign code
  - Code defined categories of signs, such as "temporary directional," "political" and "ideological" based on the message signs communicated
  - Each category of signs was subject to different restrictions (both in size and placement in and around public right-of-ways)
  - Town argued the regulation furthered legitimate governmental interests in traffic safety and aesthetic appeal

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- Court struck down the sign regulations as unconstitutional under the First Amendment
  - Regulations were not content-neutral because they differed based on a sign's "communicative intent"
  - Town failed to provide evidence to justify why it was necessary to place limitations on certain types of signs, but not others, to advance traffic safety and aesthetic beauty
  - "[O]n public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner."

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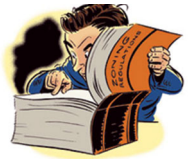
Neutral Enforcement of Sign Regulations

- In addition to drafting sign regulations to be content-neutral, regulations should be uniformly enforced to avoid a claim of selective enforcement
- Good practice to have a clear policy and procedure for enforcing signage regulations
- For example, if a township prohibits signs in a certain area, the township could choose a certain day each week/month in which employees will remove signs from the area
- It may also be useful to keep a detailed record of the dates signs are removed and types of signs removed to defend against a selective enforcement claim



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Questions

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